submitted that common sense has no application to and does not relieve the prosecution of its obligation to prove all the essential ingredients of an offence. With that proposition, I wholeheartedly agree (see Diplock J. in *Jones* v. *Metcalfe*,[4] a case of a failure to identify the motor vehicle which caused the accident, where he said: "Like Lord Parker C.J., I have every sympathy with the magistrates because the inference of fact that the appellant was the driver of the lorry at the time of the accident is irresistible as a matter of common sense; but this is a branch of the law which has little to do with common sense.").

But, has the prosecution in these cases before me failed to prove an essential ingredient of the charge against each of the remaining two appellants? I think not. In my view, the submission of counsel for the appellants is specious. It has nothing to do with an essential ingredient of a charge, which is here, the driving of a motor vehicle but with a failure to pinpoint a specified car to a specified accused. The prosecution has adduced *prima facie* evidence proving that the second appellant drove either motor car SE 8498T or EG 4031M on a charge of driving the former, and likewise in respect of the third appellant, on a charge of driving the latter. To acquit the second appellant and third appellant on the ground put forward by their counsel would lead to the conclusion that, as far as the law is concerned, neither the appellant was driving either of the two cars. This, in my view, is not only an absurdity in fact but also an absurdity in law.

In my view, the answer to the poser created by the prosecution having proved that the second appellant and the third appellant drove one or other of two cars *viz.* SE 8498T and EG 4031M but without being able to say who drove which, is that both the said appellants have been properly convicted of the offences as charged on the ground either:

(a) that the means of identification was mere surplusage, the prosecution having otherwise proved the existence of the motor vehicles driven by them at the time and place as charged, or

(b) there was an error in each charge in respect of the means of identification of the car because if the second appellant did not drive motor car SE 8498T, then he drove motor car EG 4031M and the conclusion is likewise applicable to the third appellant.

An error of this nature comes within the purview of section 161 of the Criminal Procedure Code. The question that remains to be determined is whether such an error has misled the second and third appellants. In my view, neither appellant was misled by the error as both of them were aware they had driven the cars identified by PW2. They took a deliberate stand in refusing to enter a defence on what they believed or were advised to be a substantive defect in the case for the prosecution. I do not think that the omission to link each appellant to each of the cars as charged, in circumstances where both the appellants and the cars have been identified as having engaged in a race among themselves on the highway, is a substantive defect at all. In my view, illustration (d) to section 161 of the Criminal Procedure Code is apt.

Even if I were wrong in the above conclusions, I am of the view that section 395 of the Criminal Procedure Code applies to these three cases. The failure to pinpoint the motor cars to the appellants was, at the highest, an irregularity which has not and could not have occasioned any failure of justice. If I were to accept the submission of counsel for the appellants, I would be flying in the face of reality (that such appellant drove one or other of the two cars) and logic (that if each appellant did not drive one of the two cars, he must have driven the other car). That would be a travesty of justice. The appeals are therefore dismissed.

Appeals dismissed.

Solicitors: *Leo Fernando.*

HANG LUNG BANK LTD. v. DATUK TAN KIM CHUA

[A.C.J. (Lai Kew Chai J.) October 31, 1986]

[Singapore – Suit No. 3672 of 1984]

Conflict of Laws – Proper law of debt – Whether Hong Kong law or Macau law.

Contract – Assignability of debt – Proper law of debt.

Civil Procedure – Summary judgment – Application for – Whether defence has merits – Conflict of laws issue.

In September 1981, the defendant borrowed HK$20 million from Banco Do Pacifico S.A.R.L. of Macau ("Pacific Bank Ltd."). In November 1983, when the loan

and accrued interest were outstanding and unpaid, Pacific Bank Ltd., by a deed of assignment, assigned all "rights, title and interest to and in" the loan and interest due thereunder to the plaintiffs, a bank in Hong Kong.

By clause 7 of the deed of assignment, it was provided, as between the assignors and assignees, that the assignment shall be governed by and construed in accordance with the laws of Hong Kong.

Notice of the assignment was duly given to the defendant. The defendant failed to pay the loan and interest outstanding in spite of repeated demands by the plaintiffs who commenced proceedings in the High Court and successfully obtained summary judgment against the defendant. They signed final judgment against the defendant for HK$20 million together with interest thereon at the rate of 19% per annum from September 8, 1981 until judgment and costs.

The defendant appealed against the final judgment. He contended that he had an arguable defence and that there was plainly a question of law and fact to be tried which touched on the assignability of the debt under the law of Macau. The plaintiffs submitted that the proper law of the debt was plainly the law of Hong Kong under which neither the assignability of the debt nor the intrinsic validity of the assignment could be questioned. The plaintiffs further contended that the defendant had agreed in writing not to appeal against the order for leave to sign final judgment granted in this case and that, at any rate, the defendant must in all circumstances be estopped from asserting and acting otherwise.

Held: (1) in the law of conflict of Singapore as in England, and where, as in this case, the parties had not expressly provided for the proper law to apply to their contract, their intention is to be inferred or presumed by the court from the terms of contract and the relevant surrounding circumstances;

(2) on a question of what is the proper law in the absence of an express agreement between the parties, the intention of the parties may be inferred in one of two ways: (i) by looking at the terms of the contract to see if taken as a whole they by necessary implication led to the inevitable conclusion that it was the parties' intention that their mutual rights and obligations under it should be governed by a particular system of law or (ii) by objectively determining whether a contract had its closest and most real connection with a particular system of law;

(3) the proper law of the assignment must be clearly distinguished from questions of assignability of the debt which is governed by the proper law of the debt;

(4) in the present case, the proper law of the assignment as between Pacific Bank Ltd. and the plaintiffs was not in dispute. Clause 7 of the deed of assignment applied and the proper law was Hong Kong law;

(5) however, the defendant had succeeded in raising an arguable defence, *i.e.* the question of whether or not Macau law, as supplemented by Portuguese law, is in fact and/or in law the proper law of the debt which ought to be tried;

(6) with regard to the estoppel issue, the court was unable to say whether a compromise agreement was finally concluded. In the circumstances, there were issues which had to be tried as to whether the representation, if there was one, was sufficiently unequivocal to find an estoppel and whether the plaintiffs had relied on such representation to their detriment;

(7) the defendant was granted unconditional leave to defend.

Cases referred to:

(1) *Hang Lung Bank Limited* v. *World-Wide Properties Corporation Limited* (1984, No. 1344, Supreme Court of Hong Kong).

(2) *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500, 529.

(3) *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201, 219.

(4) *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.* [1984] 1 A.C. 50.

APPEAL FROM REGISTRAR'S DECISION.

Christine Lee for the appellant/defendant.

Johnny Cheo for the respondents/plaintiffs.

Cur. Adv. Vult.

Lai Kew Chai J.: In September 1981 the defendant, a businessman, borrowed HK$20 million from Banco Do Pacifico S.A.R.L. of Macau (hereinafter referred to as "Pacific Bank Ltd"). In November 1983, when the loan and accrued interest were outstanding and unpaid, Pacific Bank Ltd. by a deed of assignment assigned all "rights, title and interest to and in" the loan and interest due thereunder to the plaintiffs, a bank in Hong Kong. By clause 7 of the deed of assignment, it was provided, as between the assignors and assignees, that the assignment shall be governed by and construed in accordance with the laws of Hong Kong. Notice of the assignment was duly given to the defendant. The defendant failed to pay the loan and interest outstanding in spite of repeated demands by the plaintiffs who commenced proceedings in the High Court and successfully obtained summary judgment against the defendant. They signed final judgment against the defendant for HK$20 million together with interest thereon at the rate of 19% per annum from September 8, 1981 until judgment and costs.

The defendant brought this appeal before me and contended that the learned Senior Assistant Registrar was wrong as he has an arguable defence, that there is plainly a question of law and fact to be tried which touched on the assignability of the debt under the law of Macau. On the other hand, the plaintiffs submitted that the proper law of the debt is plainly the law of Hong Kong under which

neither the assignability of the debt nor the intrinsic validity of the assignment could be questioned.

Indeed, if that submission is right, I did not understand the defendant to challenge the consequences of that submission under the law of Hong Kong. I shall refer to this issue as the "proper law issue". Although the issue is important and is pivotal and dependent on the acceptance of the contradictory expert evidence of the experts on the law of Macau and, possibly, of Portuguese law, which will be questions of fact if this matter goes to trial, I merely need to say at this threshold stage that I have to determine if there is "argument in law on this point which presents an arguable defence": per F. Eddis, Q.C., Deputy Judge in *Hang Lung Bank Limited* v. *World-Wide Properties Corporation Limited*[1] in the Supreme Court of Hong Kong where a substantially similar, if not a similar issue, arose under materially similar circumstances and in which the plaintiffs as against another party failed to obtain final judgment and even failed to obtain an order that the defendants in that case be only given a conditional leave to defend.

I must at once refer to another contention in this case of the plaintiffs, which did not feature at all in the other case and which only arose on the adjourned hearing of this appeal, and it is that the defendant had agreed in writing not to appeal against the order for leave to sign final judgment granted in this case and that, at any rate, the defendant must in all the circumstances be estopped from asserting and acting otherwise. I will later return to this agreement/estoppel point.

The matter arose in this way. On September 8, 1981, the defendant applied to the Pacific Bank Ltd. for a term loan of HK$20 million to be repaid with interest thereon at 19% p.a. on December 8, 1981. It was to be secured by 24 million shares in a company known as Denison Estates Limited. The loan was "credit screened" by and it was effected through the plaintiffs in Hong Kong with whom Pacific Bank Ltd. had maintained an account. The cheque drawn by Pacific Bank Ltd. was subsequently endorsed by the defendant in favour of a company in Hong Kong by the name of "Dollar Credit and Financing Ltd." These are most of the principal facts relied on by the plaintiffs in their contention that as Hong Kong had the closest and most real connection to the debt created as a result of the loan granted to the defendant the law of Hong Kong is the proper law governing the debt.

By a deed of assignment dated November 24, 1983, Pacific Bank Ltd. assigned all its rights, title and interest in the loan and interest payable thereunder to the plaintiffs. Notice of the assignment was given to the defendant by a written notice dated December 21, 1983. After a series of prevarications on the part of the defendant, which included initially a bold denial of having taken the loan at all, calling it "an outrageous claim", and empty promises, the plaintiffs lost their patience and instituted proceedings in the High Court.

In his affidavit of September 25, 1984 the defendant relied on the expert opinion of one Mr. Delfino Jose Rodriques Ribeiro who opined as follows: (a) that legal proceedings could only be instituted in the Macau Judicial Court and not elsewhere unless it was previously agreed otherwise by the parties which, it was argued, was not the case here; (b) that an assignment of a debt did not exist under Portuguese law; and (c) that doubts remained as to the competence of the Chairman of the Administrative Committee, which was appointed under the law of Macau by its Governor to run the Pacific Bank Ltd. as published in Macau Government Dispatch No. 16/83/CE to sign the deed of assignment. These opinions did not remain as live issues before me because the defendant by his affidavit on November 16, 1984 had not pursued them but had instead solely relied on the opinion of Mr. Ferando Correia Afonso. It appears that this expert witness has been practising Portuguese law (and hence Macau law) for over 30 years and was at the material times the Vice President of the Superior Council of the Portuguese Advocates Order, a position which Deputy Judge Eddis thought was equivalent to a most senior leading counsel at the English Bar. Mr. Afonso opined, *inter alia,* that "the assignments of debts and interests from a bank to another bank are (a) bank activity" and that Pacific Bank Ltd. could not lawfully assign the debt at all to the plaintiffs under Portuguese and Macau law.

On the other hand, the plaintiffs submitted that the system of the law in Hong Kong, having the closest nexus with the transaction, must have been intended by the Pacific Bank Ltd. and the defendant as the law by which the debt was to be governed.

In the law of conflict of Singapore as in England, and where, as in this case, the parties have not expressly provided for the proper law to apply to their contract, their intention is to be inferred or "presumed by the court from the terms of the

contract and the relevant surrounding circumstances": per Lord Atkin in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft.*[2]

Lord Simonds put it in not dissimilar terms in *Bonython* v. *Commonwealth of Australia*[3] where he stated that the proper law of a contract shall be "the system of law by reference to which the contract was made or with which the transaction has its closest and most real connection".

The disjunctive "or" used by Lord Simonds in *Bonython*[3] was underlined by Lord Diplock in *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.*[4] at p. 61 and one line before paragraph G. *Amin Rasheed*[4] is, in my view, a most helpful and persuasive authority on the way the intention of the parties ought to be inferred on a question of what is the proper law in the absence of an express agreement between the parties. The intention may be inferred in one of two ways, namely:

(a) by looking at the terms of the contract to see if taken as a whole they by necessary implication led to the inevitable conclusion that it was the parties' intention that their mutual rights and obligations under it should be governed by a particular system of law (which was the basis upon which Lord Diplock, Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman decided that in *Amin Rasheed*[4] the proper law was English law); or

(b) by objectively determining whether a contract had its closest and most real connection with a particular system of law (which was the basis adopted by Lord Wilberforce in *Amin Rasheed*[4] in coming to the same conclusion in that case).

I now refer to rules 81 and 82 in *Dicey & Morris on The Conflict of Laws,* 10th Ed., at pp. 569 and 573 respectively.

Rule 81 (so far as it is material for present purposes) states:

"The question of whether a debt... is capable of assignment ... is governed by the proper law of the debt ..."

The material parts of rule 82 read:

"Subject to rule 81 ..., the intrinsic validity of an assignment of a debt ..., as between the assignor and the assignee, is governed by the proper law of the assignment."

In the instant case, the proper law of the assignment as between Pacific Bank Ltd. and the plaintiffs (as assignors and assignees) is not in dispute. Clause 7 of the deed of assignment took care of it and plainly Hong Kong law is applicable. That situation, however, has to be clearly distinguished with the question of the assignability of the debt, which under rule 81 is governed by the proper law of the debt.

The learned editors of *Dicey* pointed out the importance of the distinction in the first paragraph on p. 570 as follows:

"It is submitted that the key to the problem lies in distinguishing between (1) questions of assignability, governed by the proper law of the debt (rule 81); (and) questions of the intrinsic validity of the assignment, governed by the proper law of the assignment (rule 82); ..."

Applying the principles culled from *Amin Rasheed*[4] and bearing in mind the distinction aforesaid, can I say at this stage that no issue arises on the undisputed facts that the proper law of the debt is without any further enquiry the law of Hong Kong? I regret (and I say so advisedly because the absence of merits in the case of the defendant is so manifest) to say that I am unable to say so. I respectfully agree with what Deputy Judge Eddis had said in the case I referred to earlier. Pacific Bank Ltd. was not a bank carrying out banking activities in Hong Kong. It had extended the loan through the plaintiffs in Hong Kong as its agents. The use of English in the application form for the loan is in my view of neutral weight. Like Deputy Judge Eddis, I also asked the question: "Why borrow from a Macau bank, which may give rise to an inference that parties might have agreed to Macau law being the proper law?"

There is another consideration, having regard to the fact that the loan extended here was a banking activity. As was noted by the learned editors of *Dicey,* at p. 570, some kinds of debts in some systems of laws are not assignable for the obvious reasons of either social or monetary policies in the regulation of financial institutions such as banks. If bank loans and the interests accruing on those loan transactions are assigned without any restrictions, governmental control of financial institutions may be thwarted. This was stressed by Mr. Afonso and this matter has to be investigated at a trial.

In the premises, I am of the view that the defendant had raised an arguable defence or, specifically, he has succeeded in raising the ques-

tion whether or not Macau law, as supplemented by Portuguese law, is in fact and/or in law the proper law of the debt which ought to be tried.

I now turn to the agreement/estoppel issues. After judgment was obtained on November 30, 1984 the defendant negotiated with Mr. William Fleming, the managing director of the plaintiffs. Without going into the details of the negotiations, what they had allegedly agreed, and more specifically, what the defendant had allegedly represented to the plaintiffs, was recorded in a letter dated December 11, 1984 drafted on behalf of the plaintiffs and which was signed by the defendant. The subject matter of the letter covered the judgments obtained in this case and in another action also instituted by the plaintiffs against the defendant in Singapore.

As much turns on this letter, I reproduce it in full:

"Hang Lung Bank, Ltd.,
3/F, United Centre,
Hong Kong.

Dear Sirs,

Re: Singapore High Court Actions 3671 and 3672 of 1984

This letter is written with the object of making to you certain proposals in regard to the above two actions instituted by you against me in Singapore and in relation to your claims covered by those actions.

(1) After due consideration, I can definitely confirm that the judgments against me in the above two actions given on November 30, 1984 whereby your claims were allowed in their entirety by the Singapore court and judgment was entered against me are valid and correct and that I do not intend to appeal against such judgments. I understand the necessity of my acknowledging the validity of such judgments before you consider paragraphs (2) and (3) of this letter.

(2) As first priority I wish to achieve a solution in respect of the claim relating to my current account No. 80106-11 with Pacific Bank Limited of Macao, the subject matter of Singapore High Court Action 3671 of 1984. I am pleased to inform you that I have found a purchaser for the 15,000,000 shares of Hinfield Co. Ltd. of Hong Kong represented by Certificates Nos. 26 and 27 held by you. I hereby authorize you to release such certificates to Messrs Chan & Lo, Solicitors of 17/F, Aurora House, 57-59 Connaught Road Central, Hong Kong, against receipt by you of the sum of HK$19,030,000 towards my liability to you provided that such arrangement shall be satisfactory to you. When you have indicated your satisfaction as to such arrangement then, upon receipt by you of the sum of HK$19,030,000, such will be accepted by you in full and final settlement of my liability to you in respect of the judgment in Singapore High Court Action 3671 of 1984 and my liability to you in respect of my current account No. 80106-11 with Pacific Bank Limited.

(3) As an entirely separate matter from the claims mentioned in paragraph (2) of this letter, I shall be most obliged if we could discuss settlement proposal in respect of my liability to you under the judgment in Singapore High Court Action 3672 of 1984 at a mutually convenient time within the next 30 days.

Yours faithfully,

Sgd: Tan Kim Chua"

I note that the defendant had stated in the letter that the judgments were "valid and correct and that I (the defendant) do not intend to appeal against such judgments before you consider paragraphs (2) and (3)". I also note that Mr. William Fleming had settled the other action by accepting a smaller sum. However, I am unable to say that a compromise agreement was finally concluded so far as this case is concerned.

Nor am I able to conclude that the defendant had represented that he will not appeal; the matter may be inconclusive in view of the opening words in para (3) of the letter which state: "As an entirely separate matter...". Further and the defendant has asserted that at the time the letter was written, he was in respect of this case proceeding with his appeal to the knowledge of the plaintiffs. He said that his understanding was that the two suits were separately dealt with and that, far from agreeing to settle the other suit at HK$19,030,000 in reliance of his withdrawal of this appeal, the plaintiffs had enlisted his help to sell the Hinfield shares which he successfully did to assist the plaintiffs who were facing a financial crisis in Hong Kong. In the circumstances, there are issues which have to be tried as to whether the representation, if there was one, was sufficiently unequivocal to found estoppel and whether the plaintiffs had relied on such representation to their detriment.

Finally, I turn to the question whether I should impose any condition in granting leave to defend. Like Deputy Judge Eddis, I can "find nothing shadowy or contrived in the views expressed by Mr Afonso". The defendant has raised questions to be tried on both the proper law issue and the agreement/estoppel issues. Accordingly, the judgment in favour of the plaintiffs is set aside and I grant the defendant unconditional leave to defend.

Order accordingly.

Solicitors: *Robert W. H. Wang & Woo; Shook Lin & Bok.*